

March 3, 2017

## Washington Update

### This Week in Congress

- **House** – The House passed the “OIRA Insight, Reform, and Accountability Act” (H.R. 1009); the “SCRUB Act” (H.R. 998); the “Regulatory Integrity Act of 2017” (H.R. 1004); and H.J.Res. 83, to disapprove of the Department of Labor rule relating to “Clarification of Employer’s Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness.”
- **Senate** – The Senate confirmed the nominations of **Wilbur Ross to be Secretary of Commerce; Ryan Zinke to be Secretary of the Interior; Rick Perry to be Secretary of Energy; and Dr. Ben Carson to be Secretary of Housing and Urban Development.**

### Next Week in Congress

- **House** – The House is expected to consider the “Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017” (H.R. 985); the “Innocent Party Protection Act” (H.R. 725); the “Department of Defense Appropriations Act, 2017” (H.R. 1301); and the “Lawsuit Abuse Reduction Act of 2017” (H.R. 720).
- **Senate** – The Senate will consider **H.J.Res.37**, disapproving the rule submitted by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration relating to the Federal Acquisition Regulation.

## TAX

### **Trump’s Speech Offers Little Clarity on Tax, More Details Expected in Upcoming Weeks**

#### *Key Points:*

- *The address to Congress reiterated Trump’s prior comments on tax reform but did not provide policy details or indicate where the Administration stands on the border adjustment tax*

President Donald Trump’s speech to a joint session of Congress provided no significant new insight into the Administration’s position on the proposed border adjustment tax. Trump said the Administration is “developing historic

tax reform that will reduce the tax rate on our companies so they can compete and thrive anywhere and with anyone” while simultaneously providing “massive tax relief for the middle class.” Trump called for leveling the playing field for American companies and workers, and emphasized his commitment to free trade that is also fair trade.

Proponents of a border adjustment tax focused

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on his use of the term border tax and discussion of leveling the playing field. However, the use of the term tariffs and free trade discussion in juxtaposition to the tax issues meant there was little clarity as to the policy details the President might support in the area.

Observers are awaiting the more detailed tax proposal the White House has promised in a week or two, though the exact timing remains fluid and the level of detail that will be forthcoming remains unclear.

*For more information about tax issues you may [email](#) or call Christopher Hatcher at 202-659-8201. Nicholas Karellas and Laura Simmons contributed to this section.*

## **TRADE**

### **Trump Administration Releases Annual Trade Policy Review**

#### *Key Points:*

- *Administration's trade policy agenda makes some significant changes including asserting U.S. sovereignty when there are adverse trade rulings at the World Trade Organization*

The Trump Administration released its annual trade policy review entitled "[The President's Trade Policy Agenda - 2017](#)". The report suggests the following policy guides on trade: defend national sovereignty over trade policy; strictly enforce U.S. trade laws; use all possible sources of leverage to open markets to U.S. exports of goods and services and protect intellectual property (IP); and negotiate "new and better trade deals" with countries in key markets around the world. The report specifically cites robust use of U.S. trade remedy laws, and discussing Sections 201 and 301 of the Trade Act of 1974, which gives the

President significant authority to put in place safeguard tariffs or other actions to address unfair practices.

The policy piece asserts U.S. sovereignty in the event of an adverse trade ruling at the World Trade Organization (WTO), saying that WTO rulings in disputes do not change U.S. law. The report also discusses trade remedies and suggests the Trump Administration will act aggressively against any WTO rulings that undermine the use of any trade remedy. Note this policy review comes after a recent report that the United States Trade Representative (USTR) is looking into legal options for the Trump Administration to bypass the WTO's dispute settlement system in order to implement unilateral trade sanctions against countries such as China.

The document also recognizes the USTR's role and responsibility over trade policy and promises a more detailed policy when a USTR is in place.

### **Wilbur Ross Confirmed as Commerce Secretary; Lighthizer Nomination as USTR Stalled in Senate**

#### *Key Points:*

- *Senate voted 72-27 to confirm Wilbur Ross to be the next Commerce Secretary*
- *Robert Lighthizer confirmation requires 60 votes*

#### **Upcoming Dates**

**March 15, 2017: Debt limit suspension ends**

**April 28: FY 2017 CR expires**

**September 30, 2017: FY 2017 ends and FAA extension expires**

This week, the Senate voted to confirm Wilbur Ross to be the Secretary of Commerce by a vote of 72-27. Ross is expected to play a leading role in the Trump Administration's trade policy, including the renegotiations of the North American Free Trade Agreement (NAFTA) and has advocated for bilateral trade agreements.

Meanwhile, United States Trade Representative (USTR) nominee Robert Lighthizer to be the USTR remains stalled in the Senate over an unrelated issue of coal miner pensions. Democrats can block Lighthizer's nomination as his confirmation requires a 60 vote waiver to serve USTR because he represented foreign countries in the early 1990's. A 1995 law was changed that prevented anyone who represented a foreign government from becoming USTR. In the late 1990's a similar waiver was required when Charlene Barshevsky became the USTR.

*For more information about trade issues you may [email](#) or call Christopher Hatcher at 202-659-8201. Nicholas Karellas and Laura Simmons contributed to this section.*

## **FINANCIAL SERVICES**

### **House Financial Services Committee Releases Report on the FSOC Designation Process; Approves Budget Views**

#### *Key Points:*

- *The Committee released a report criticizing the FSOC's process for designating systemically important financial institutions as arbitrary and inconsistent.*
- *The Committee also approved its Budget Views and Estimates for Fiscal Year 2018.*

On February 28, the House Financial Services Committee held a [markup](#) and approved the [Committee's views and estimates on the budget for Fiscal Year \(FY\) 2018](#) by a vote of 33-25. The Committee rejected a number of Democratic amendments to the views and estimates related to sanctions on Russia, the Orderly Liquidation Authority (OLA), the Consumer Financial Protection Bureau (CFPB), the Export-Import Bank, and Securities and Exchange Commission (SEC) enforcement and investigations.

The Committee also approved a motion (33-25 vote) authorizing the release of excerpts of the transcript of the deposition of Patrick Pinschmidt. The Committee released a [report](#), "The Arbitrary and Inconsistent Financial Stability Oversight Council (FSOC) Nonbank Designation Process", summarizing their findings as well as excerpts from the Pinschmidt deposition.

Among other discussion in the report, it stated that "FSOC applied different standards to different companies in its evaluations" in its treatment of a company's collateral. It stated that the "differential treatment of certain companies by the FSOC is explicit in the context of securities lending and repurchase agreements." The report also says the FSOC did not follow its definitions "for what constitutes a threat to the stability of the United States."

### **SEC Approves Disclosure Initiatives**

#### *Key Points:*

- *The Securities and Exchange Commission unanimously approved several proposals and rule related to improving disclosures.*
- *Acting Chairman Michael Pivowar stated the recommendations "promote regulatory efficiency by streamlining, rationalizing, modernizing or*

*eliminating duplicative regulatory burdens currently in effect under existing rules and guidance.”*

At a March 1, [open meeting](#) the Securities and Exchange Commission (SEC) voted unanimously on four proposals and rules aimed at improving disclosures provided to investors. Acting Chairman Michael Piwowar stated these recommendations “promote regulatory efficiency by streamlining, rationalizing, modernizing or eliminating duplicative regulatory burdens currently in effect under existing rules and guidance.” In her remarks on these initiatives, Commissioner Kara Stein noted the changes in the markets and the need for the SEC to utilize advances in technology. She stated the rule related to hyperlinks will make it easier for investors to search company filings and find information necessary to make smart investment decisions.

First, the Commission voted to issue a request for comment on possible revisions to Industry Guide 3, “*Statistical Disclosure by Bank Holding Companies.*” The request seeks comment on potential improvements to the disclosure regime for bank holding companies (BHCs), possible elimination of duplicative or overlapping disclosures, consideration of the scope and applicability of Guide 3, and the impact of regulations on BHCs.

Second, the Commission approved adoption of rule and form amendments requiring registrants to include hyperlinks to exhibits and to file their registration statements and report in HTML format. Smaller reporting companies will be granted additional time to meet the HTML requirements.

The Commission also voted to propose amendments to require the use of Inline XBRL for the submission of operating company

financial statements and mutual fund risk/return summaries. In addition, the proposal would remove the requirement that filers post Interactive Data Files on their websites.

Finally, the Commission voted to propose amendments to Rule 15c2-12 under the Securities Exchange Act of 1934 to amend the list of event notices that a “broker, dealer of municipal securities dealer acting as an underwriter in a primary offering of municipal securities must disclose to the Municipal Securities Rulemaking Board (MSRB).” Under the rule two new events are added to the list: “incurrence of a financial obligation of the issuer” related to covenants, events of defaults, remedies, priority rights or other similar terms; and “default, event of acceleration, termination event, modification of terms or other similar events.”

## SEC Holds Dialog on Crowdfunding

### Key Points:

- *The Securities and Exchange Commission held a “SEC-NYU Dialog on Securities Markets-Securities Crowdfunding in the U.S.” which focused on the funding needs of small and emerging companies, the challenges of protecting investors in crowdfunding, and the current levels of crowdfunding.*
- *Acting Chairman Michael Piwowar noted that to date 163 crowdfunding deals have been initiated, 33 have completed, over \$10 million has been raised, and 21 funding portals have been registered.*

On February 28, the Securities and Exchange Commission (SEC) [held](#) a “SEC-NYU Dialogue on Securities Markets – Securities Crowdfunding in the U.S.” The sessions focused on: (1) the “funding needs of small and emerging companies, legal requirements for

crowdfunding issuers and funding portals, and the impact of securities crowdfunding for various market participants such as companies, investors, entrepreneurs, and regulators”; (2) “the challenges and tradeoffs of protecting investors in crowdfunding transactions while facilitating fundraising among small firms and entrepreneurs with limited access to alternative sources of capital”; and (3) “empirical evidence on the current levels of securities crowdfunding, and a discussion of how future research can help shape the development of this new securities market segment.”

Acting Chairman Michael Piowar stated since passage of Regulation Crowdfunding in May 2016, 163 securities-based crowdfunding deals have been initiated of which 33 have completed their fundraising. He explained that SEC staff has begun to perform analyses on the data collected. He stated over \$10 million has been raised and there are 21 registered funding portals in operation. Piowar explained that crowdfunding is a “creative, alternative approach” to financing small businesses but without sound investor protections it will not thrive. He suggested that some of the results seen highlight the fact that many of the entities engaging in crowdfunding may not have otherwise had access to capital. He expressed an interest in seeing empirical studies of capital raising under the crowdfunding rules and he expressed his concerns as to whether the final rules are too restrictive or too burdensome. Piowar suggested that based on evidence, the SEC should consider whether any further steps should be taken to improve the crowdfunding regulations, including the use of exemptive authority. In addition, he explained that the dialogue could provide helpful information for Congress to consider whether any legislative changes to the law should be made.

Commissioner Kara Stein noted that according to SEC data 60 percent of offerings and over 90 percent of the total amount raised is concentrated in the top five federal crowdfunding states. She suggested the SEC needs to further examine the geographic and demographic trends regarding users of crowdfunding and she suggested that further outreach and education may be necessary to ensure opportunities are accessible to everyone.

### **Senate Confirms Dr. Ben Carson to be Secretary of the Department of Housing and Urban Development**

#### *Key Points:*

- *Dr. Ben Carson was confirmed a Secretary of the Department of Housing and Urban Development by a vote of 58 to 41.*

On March 2, 2017, the Senate voted 58 to 41 to confirm Dr. Ben Carson to be the Secretary of Housing and Urban Development. Six Democrats, Senate Banking Committee Ranking Member Sherrod Brown (D-OH) and Senators Joe Donnelly (D-IN), Heidi Heitkamp (D-ND), Joe Manchin (D-WV), Jon Tester (D-MT), and Mark Warner (D-VA), joined 51 Republicans along with Senator Angus King from Maine (an Independent who caucuses with the Democrats) to vote for Carson. The Department of Housing and Urban Development had an operating budget of approximately \$47 billion in the last fiscal year and employs around 8,000 full time employees.

### **SEC Commissioners Address “SEC Speaks” Conference**

#### *Key Points:*

- *Acting Chairman Michael Piowar has asked the SEC staff to reconsider the conflict minerals rule and the pay ratio rule, while President Trump has signed an Executive*

*Order vacating the resource extraction disclosures.*

- *Commissioner Kara Stein urged the Commission to assess whether the current regulatory structure is sufficient to keep pace with the changing markets.*

On February 24, the Securities and Exchange Commission Acting Chairman Michael Piwowar gave [remarks](#), “Remembering the Forgotten Investor,” suggesting the disclosure regime has “repeatedly been coopted for purposes unrelated to investor protection.” He noted the Dodd-Frank Act is “rife” with examples of burdensome requirements such as the conflict minerals rule, resource extraction and the pay ratio rule. He noted he has asked the SEC staff to consider whether the guidance on the conflict minerals rule is still appropriate, whether additional relief is needed and to seek public comment on the challenges encountered in the implementation of the pay ratio rule. He stated President Donald Trump has also issued an Executive Order vacating the Commission’s rule on resource extraction disclosures. Piwowar also expressed the need for the SEC to reconsider the “line-drawing” between “accredited” and “non-accredited investor”, explaining that “a well-intentioned policy of investor protection can do more harm than good, for instance, by exacerbating inequalities of wealth and opportunity.”

In her [remarks](#), “The Markets in 2017: What’s at Stake?” Commissioner Kara Stein noted the vast changes the markets have undergone. She noted the SEC and the exchanges have undertaken initiatives to address issues such as flash crashes and have begun to develop a Consolidated Audit Trail. She suggested that more is needed to assess whether the current regulatory structure is sufficient to withstand changes in the markets. Commissioner Stein also stated that “institutional investors now

dominate the U.S. equities market”, owning 70 percent of public shares. She suggested the need to think about how companies can be impacted when “just three managers hold the largest ownership position in 88 percent of the companies in the S&P 500.” She also raised concern that exchange-traded products have experienced significant increases in trading but “continue to be governed by a patchwork of rules and exemptions largely developed a decade or more ago.”

## Upcoming Hearings and Events

### **March 8**

***Financial Services Appropriations:*** The House Appropriations Committee’s Subcommittee on Financial Services and General Government will hold a “Member’s Day,” during which Members of the House will be able to provide input on the appropriations process.

### **March 9**

***Investor Advisory Committee:*** The Securities and Exchange Commission (SEC) will hold a meeting of its Investor Advisory Committee. The agenda for the meeting includes: “remarks from Commissioners; a discussion regarding SEC investor research initiatives, the FINRA 2016 Financial Capability Study, and academic research on financial literacy; a discussion regarding unequal voting rights of common stock; a report on the nonpublic administrative work session; and a nonpublic administrative work session during lunch.”

***Flood Insurance Reform:*** The House Financial Services Committee’s Subcommittee on Housing and Insurance will hold a hearing entitled “Flood Insurance Reform: FEMA’s Perspective.”

**Securities and Capital Formation:** The Senate Banking Committee may vote on several securities bills.

*For more information about financial services issues you may [email](#) or call Joel Oswald at 202-659-8201. Alex Barcham and Rebecca Konst contributed to the articles.*

## **ENERGY & ENVIRONMENT**

### **DOE and Interior Secretaries Confirmed; Members of Congress Press White House on FERC Vacancies**

#### *Key Points:*

- *Efforts to fill out Trump’s cabinet continued this week with the Senate confirming Governor Rick Perry (R-TX) as Secretary of Energy and Congressman Ryan Zinke (R-MT) as Secretary of Interior.*
- *Members of Congress also called for prompt nomination and confirmation of members of the Federal Energy Regulatory Commission (FERC) to restore the agency’s operating quorum.*

**Department of Energy:** On March 2, the Senate [voted 62-37](#) to confirm former Texas Governor Rick Perry as Secretary of Energy. Then President-Elect Donald Trump [announced](#) his intent to nominate Perry on December 14, 2016. Perry served as Governor of Texas from 2000 to 2015, and competed in the Republican presidential primaries in 2012 and 2016. The Department’s budget and operations are focused on the management of the U.S. nuclear weapons stockpile, as well as cleanup of legacy federal nuclear facilities. The Department also manages the Strategic Petroleum Reserve and is responsible for authorizing exports of liquefied natural gas.

**Department of Interior:** On Wednesday, the Senate [voted 68-31](#) to confirm Representative

Ryan Zinke (R-MT) to be Secretary of Interior. Zinke was first elected to Congress to represent Montana’s at-large House district in 2014. He served on the Natural Resources Committee, which has jurisdiction over the Department of Interior, including its energy regulatory functions through the Bureau of Land Management (BLM), the Bureau of Ocean Energy Management (BOEM), the Bureau of Safety and Environmental Enforcement (BSEE), and the Office of Surface Mining Reclamation and Enforcement (OSMRE). Zinke was also sworn-in on March 1. On March 2, he signed two Secretarial Orders:

- “Revocation of the United States Fish and Wildlife Service Director’s Order No. 219 (Use of Nontoxic Ammunition and Fishing Tackle)” ([Order 3346](#)); and
- “Conservation Stewardship and Outdoor Recreation” ([Order 3347](#)), which, as described in a Department of Interior [press release](#), “advances conservation stewardship, improves game and habitat management, and increases outdoor recreation opportunities by directing bureaus and agencies to immediately identify areas where recreation and fishing can be expanded.”

#### ***Federal Energy Regulatory Commission:***

Members of Congress are raising concerns regarding the lack of a quorum at the Federal Regulatory Commission (FERC), which inhibits the agency from making significant decisions related to energy markets. FERC lost its quorum following Commissioner Norman Bay’s resignation on February 3. FERC requires three commissioners to constitute a quorum. Bay’s departure left two members of the Commission: Acting Chair Cheryl LaFleur and Commissioner Colette Honorable. On March 2, House Energy and Commerce Committee Chairman Greg Walden (R-OR) and Energy

Subcommittee Chairman Fred Upton (R-MI) sent a [letter](#) to President Trump asking him “to prioritize the nomination of highly qualified, experienced candidates to fill existing vacancies at the Federal Energy Regulatory Commission.” They noted that, as long as FERC lacks a quorum, “major...decisions are stalled, including the licensing of interstate natural gas pipelines, liquefied natural gas terminals, and hydropower projects.” On February 22, 2017, Representative Tim Walberg (R-MI) led a bipartisan [letter](#), signed by more than 90 House members, that similarly urged President Trump to “prioritize the nomination and confirmation of commissioners...so that the current standstill at the agency can quickly be resolved.”

### **EPA Withdraws Information Collection Request on Emissions from the Oil and Gas Sector**

#### *Key Points:*

- *The Environmental Protection Agency (EPA) ended an Information Collection Request (ICR) targeting greenhouse gas emissions from the oil and gas sector.*
- *The ICR, issued by the Obama Administration’s EPA, would have served as the basis for Clean Air Act regulations of emissions from oil and gas production, and natural gas pipelines and other facilities.*

On March 2, the Environmental Protection Agency (EPA) announced that it withdrew the agency’s Information Collection Request (ICR) regarding emissions from existing oil and gas sector sources. A [press release](#) announcing Thursday’s action stated that the “withdrawal is effective immediately, meaning owners and operators – including those who have received an extension to their due dates for providing the information – are no longer required to respond.” EPA Administrator Scott Pruitt said

the “action will reduce burdens on businesses while we take a closer look at the need for additional information from this industry.”

In November, 2016, the EPA issued the final ICR, along with supporting documents:

- A [fact sheet](#) on the final ICR;
- An “[Information Collection Request Supporting Statement](#)”;
- The “[Part 1 Operator Survey](#)”; and
- The more detailed “[Part 2 Facility Survey](#)”.

### **House Science Committee Considers Social Cost of Carbon**

#### *Key Point:*

- *Two House Science Committee subcommittees heard testimony on the Obama Administration’s efforts to calculate the “social cost of carbon” as part of its regulatory program targeting greenhouse gas emissions.*

On February 28, the House Science, Space, and Technology Committee’s Environment and Oversight Subcommittees held a joint [hearing](#) entitled “At What Cost? Examining the Social Cost of Carbon.” The hearing saw the panels’ Republicans criticize the social cost of carbon calculations established by the Obama Administration and its Environmental Protection Agency (EPA). Committee Democrats defended the social cost of carbon as an important tool in the effort to address climate change.

In his [opening statement](#), Environment Subcommittee Chairman Andy Biggs (R-AZ) noted that that the Obama Administration’s Interagency Working Group established the Social Cost of Carbon (SCC) and asserted that the cost was determined by outdated statistical models. He stated that the working group used

numbers that allowed them to advance their political agenda and said that the Administration determined the cost without a scientific basis. Biggs argued that the Administration failed to take into account the Office of Management and Budget's (OMB) guidelines for cost-benefit analysis.

Science, Space, and Technology Committee Chairman Lamar Smith (R-TX) declared in his [opening statement](#) that a “little known component of environmental regulations is the social cost of carbon...[through which t]he EPA attempts to put a price on a ton of carbon emitted into the atmosphere.” Smith noted that the social cost of carbon was used in support of promulgation of the EPA's Clean Power Plan rule, which would limit greenhouse gas emissions from existing power plants.

In her [opening statement](#), full Committee Ranking Member Edie Bernice Johnson (D-TX) argued that “the Social Cost of Carbon attempts to quantify the economic consequences of our fossil fuel related actions” and that greenhouse gas emissions impose “financial costs and social consequences to our environment, to public health and to our economy.”

### Conference Considers Regulatory Reforms

#### Key Points:

- *The Center for the Study of the Administrative State, along with the ABA's Administrative Law and Regulatory Practice Section, held a conference on the role of Congress in reforming the federal regulatory process.*
- *Speakers discussed pending and potential legislation, including: the “Regulations from the Executive In Need of Scrutiny Act” and the “Regulatory Accountability Act”.*

On March 2, the Center for the Study of the Administrative State and the American Bar Association's Section of Administrative Law and Regulatory Practice held a [conference](#) titled “The Time for Regulatory Reform in Congress”. Discussion focused on proposed legislation that would reform the regulatory process, as well as the use of the Congressional Review Act (CRA) to rescind regulations promulgated in the final months of the Obama Administration.

Senate Permanent Subcommittee on Investigation Staff Director and Chief Counsel Matthew Owen suggested that Congress may pass between 10 and 15 CRA resolutions of disapproval repealing Obama Administration rules. He also predicted that, with the expanded use of the CRA, courts in the future will determine what constitutes a “substantially similar rule.” The statute states that a rule disapproved by Congress under the CRA “may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law”. Owen also noted that the House-passed “Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017” ([H.R. 26](#)) would “reverse the default assumption” of the CRA by requiring Congress to affirm a regulation by passing a resolution that would be signed by the President before the regulation could take effect.

Pacific Legal Foundation Executive Director and Senior Fellow in Constitutional Law Todd Gaziano remarked that the “fulcrum” of the CRA “is its first sentence”: “Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule,

including whether it is a major rule; and (iii) the proposed effective date of the rule.” He also noted that the CRA is intended to apply to all generally applicable policy actions undertaken by federal agencies. Gaziano discussed the potential for older regulations and policy guidance, in cases when agencies failed to submit the required report to Congress, could be subject to repeal under the CRA. He suggested that some of these regulatory actions could include guidance documents and policy manuals.

Case Western University Center for Business Law and Regulation Director and Johan Verheij Memorial Professor of Law Jonathan Adler also discussed the REINS Act. He suggested that one reason to enact the REINS Act is because Congress infrequently acts on reauthorization of regulatory statutes, noting that the “last time the Clean Air Act was significantly modified was 1990.” Adler asserted that the REINS Act would ensure that agencies exercise legislative authority in a way that is consistent with the desires of the current Congress. He also predicted that enactment of the REINS Act would better ensure that agencies will be more faithful to the delegated authority from Congress and not seek to implement “what they can get away with in the courts.”

George Washington University F. Elwood and Eleanor Davis Research Professor of Law Jonathan Siegel said that the REINS Act is constitutional as it would only “take from agencies a power [Congress] never had to give them in the first place.” He argued against enacting that legislation however, positing that Congress would not have the time or expertise to handle the high volume of approval resolutions that would be required.

George Washington University Regulatory Studies Center Director Susan Dudley and Trachtenberg School of Public Policy and Public Administration Distinguished Professor Susan Dudley discussed the “Regulatory Accountability Act” ([H.R. 5](#)), which includes provisions that would codify President Clinton’s [Executive Order 12866](#).

George Washington University Lyle T. Alverson Professor of Law Richard Pierce Jr. recalled President Reagan’s [Executive Order 12291](#), which required federal agencies to conduct cost-benefit analyses before promulgating regulations, and that a rule’s benefits exceed its costs. He recommended applying this requirement to independent agencies. Pierce called for inviting all regulated firms to submit to the Office of Information and Regulatory Affairs (OIRA) any regulations that are “obsolete” or “unduly burdensome”.

Hoover Institution Research Fellow Adam White expressed support for the “Regulatory Accountability Act”. He also suggested the benefits of requiring agencies to go through additional “hoops”, particularly when promulgating complex rules such as the Clean Power Plan and the Waters of the United States rule.

University of Minnesota Law School Distinguished McKnight Professor of Law and Harlan Rogers Professor in Law and Corporate Institute Associate Director Kristen Hickman commented that agencies have been “creative” in avoiding the transparency and procedural requirements of the Administrative Procedure Act. Hickman cited agency actions such as issuing guidance documents and settlement agreements through coordinated litigation.

### Upcoming Hearings and Events

**March 8**

***Nuclear Power Legislation:*** The Senate Environment and Public Works Committee will hold a hearing on the “Nuclear Energy Innovation and Modernization Act” ([S. 512](#)). As described in a Committee [press release](#): “S. 512 will promote innovation in the nuclear sector by enabling processes for licensing new reactors. This legislation will modernize the Nuclear Regulatory Commission (NRC) by establishing new transparency and accountability measures to the commission’s budget and fee programs. The bill will develop the regulatory framework necessary to enable the licensing of advanced nuclear reactors. Additionally, the Act will improve the efficiency of uranium regulation. Finally, it will bring transparency and accountability to the process by which the Department of Energy (DOE) disposes of the American public’s stockpile of excess uranium.”

***Members’ Funding Priorities:*** The House Appropriations Committee’s Energy and Water Development, and Related Agencies Subcommittee will hold a “Members’ Day” [hearing](#) on Fiscal Year 2018 funding priorities.

**March 9**

***Tribal and Insular Infrastructure:*** The House Natural Resources Committee’s Indian, Insular, and Alaska Native Affairs Subcommittee will hold a [hearing](#) titled “Improving and Expanding Infrastructure in Tribal and Insular Communities”.

***Science and Federal Regulations:*** The Senate Homeland Security and Governmental Affairs Committee’s Regulatory Affairs and Federal Management Subcommittee will hold a [hearing](#) titled “Agency Use of Science in the Rulemaking Process: Proposals for Improving Transparency and Accountability”.

**June 26-27**

***EIA Energy Conference:*** The Energy Information Administration (EIA) will hold its annual [Energy Conference](#). Conference topics include: “U.S. exports of crude oil and petroleum products”; “Renewable finance and project costs”; “The energy-water nexus and induced seismicity”; “The future of nuclear power”; “Gasoline fuel quality and octane supply”; “Big data and energy information”; “Natural gas infrastructure to serve growing markets”; “Coal and natural gas competition”; and “Human behavior and energy use in buildings”.

*For more information about energy and environment issues you may [email](#) or call Frank Vlossak at 202-659-8201. Michaela F. Boudreaux contributed to this report. Updates on energy and environment issues are also available on [twitter](#).*

**DEFENSE****Trump Stresses National Security In Speech To Congress**

*Key Points:*

- *Trump emphasized his proposed increase in defense spending, the threats posed by forces in the Middle East, and the need for European allies to better shoulder the burdens of shared defense*
- *The Armed Services Chairman called Trump’s \$54 billion increase inadequate*

On February 28, President Donald Trump made national security issues a centerpiece of his first address to Congress.

Trump stated that “[o]ur obligation is to serve, protect, and defend the citizens of the United States...[and] [w]e are also taking strong measures to protect our nation from radical islamic terrorism.” He said that “[a]ccording to

data provided by the Department of Justice, the vast majority of individuals convicted for terrorism-related offenses since 9/11 came here from outside of our country.” Trump stated that “[w]e have seen the attacks at home — from Boston to San Bernardino to the Pentagon and yes, even the World Trade Center...[and] [w]e have seen the attacks in France, in Belgium, in Germany and all over the world.”

Trump said that “[i]t is not compassionate, but reckless, to allow uncontrolled entry from places where proper vetting cannot occur...[and] [t]hose given the high honor of admission to the United States should support this country and love its people and its values.” He said that “[w]e cannot allow a beachhead of terrorism to form inside America -- we cannot allow our nation to become a sanctuary for extremists.” Trump stated that “[t]hat is why my Administration has been working on improved vetting procedures, and we will shortly take new steps to keep our nation safe and to keep out those who would do us harm.”

Trump stated that “[a]s promised, I directed the Department of Defense to develop a plan to demolish and destroy the Islamic State of Iraq and Syria (ISIS) -- a network of lawless savages that have slaughtered Muslims and Christians, and men, women, and children of all faiths and beliefs.” He said that “[w]e will work with our allies, including our friends and allies in the Muslim world, to extinguish this vile enemy from our planet.” Trump added that “I have also imposed new sanctions on entities and individuals who support Iran's ballistic missile program, and reaffirmed our unbreakable alliance with the State of Israel.”

Trump said that “to keep America Safe we must provide the men and women of the United States military with the tools they need

to prevent war and — if they must — to fight and to win.” He said that “I am sending the Congress a budget that rebuilds the military, eliminates the Defense sequester, and calls for one of the largest increases in national defense spending in American history.”

Trump said that “[t]o those allies who wonder what kind of friend America will be, look no further than the heroes who wear our uniform.” He stated that “[o]ur foreign policy calls for a direct, robust and meaningful engagement with the world...[and] [i]t is American leadership based on vital security interests that we share with our allies across the globe.” Trump said that “[w]e strongly support NATO, an alliance forged through the bonds of two World Wars that dethroned fascism, and a Cold War that defeated communism...[b]ut our partners must meet their financial obligations.” He said that “based on our very strong and frank discussions, they are beginning to do just that.” Trump stated that “[w]e expect our partners, whether in NATO, in the Middle East, or the Pacific — to take a direct and meaningful role in both strategic and military operations, and pay their fair share of the cost.”

According to a [fact sheet](#) released by the White House, “Trump has taken action to ensure the safety and security of the United States homeland, its borders, and its people.

- President Trump has proposed increasing the military’s budget by \$54 billion so that it can begin to rebuild.
- President Trump signed a Presidential Memorandum directing the Secretary of Defense to work with other cabinet members to develop a plan to defeat ISIS.
- President Trump ordered a review of military readiness and made it the

policy of the United States to rebuild the United States' Armed Forces.

- Under President Trump's leadership, the Department of the Treasury sanctioned 25 entities and individuals involved in Iran's ballistic missile program.
- President Trump accelerated negotiations that drove down the price of the F-35 fighter, saving more than \$700 million.

In response to the announcement that the Trump Administration would request \$54 billion more for the Department of Defense (DOD) than the current level of funding, both Armed Services Committee Chairmen indicated that the proposed increase was insufficient.

In a [statement](#), House Armed Services Committee Chairman Mac Thornberry (R-TX) said that “[o]ver the course of the Obama Administration, our military funding was cut 20 percent while the world grew more dangerous.” He said that “[w]hile we cannot repair all of the damage done by those cuts in a single year, we can and should do more than this level of funding will allow...[t]he Administration will have to make clear which problems facing our military they are choosing not to fix.” Thornberry stated that “[w]e cannot make repairing and rebuilding our military conditional on fixing our budget problems or on cutting other spending.”

In his [press release](#), Senate Armed Services Committee Chairman John McCain (R-AZ) said that “[t]he White House has announced that the President intends to submit a defense budget request for \$603 billion...[which would] would represent an increase of \$18.5 billion above the level proposed by President Obama for FY 2018.” He said that “Trump intends to submit a defense budget that is a mere 3

percent above President Obama's defense budget, which has left our military underfunded, undersized, and unready to confront threats to our national security.” McCain stated that “Thornberry and I agree a defense budget of \$640 billion is required in FY 2018 as a first step toward restoring military readiness, rebuilding our military, and reshaping our forces for the realities of 21st century warfare.”

### **DOD May Institute Broader Reform Than Called For In FY 2017 NDAA**

#### *Key Points:*

- *The Deputy Secretary explained the DOD's current thinking on how to reform acquisitions practices brought on by splitting the Under Secretary for Acquisitions, Technology and Logistics into two positions*

This week, Deputy Secretary of Defense Robert Work submitted to Congress the interim report required by Section 901 of the “National Defense Authorization Act (NDAA) for FY 2017” (P.L. 114-328) in regards “to the disestablishment of the Under Secretary of Defense (USD) for Acquisition, Technology, and Logistics (AT&L), the establishment of the USDs for Research and Engineering (R&E) and Acquisition and Sustainment (A&S), and the establishment of the Chief Management Officer (CMO) of the Department of Defense (DOD).” Work noted that “[w]hile it would be premature to get ahead of the Secretary's final decisions on this important reorganization, as part of the interim report, the following is the general direction of the Department's efforts to date:

- With regard to the disestablishment of the USD (AT&L), the Department intends to take full advantage of the flexibility inherent in section 901 to conduct a broader rationalization of the

offices, organizations, and processes within the USD (AT&L) portfolio and their alignment, and potential overlap, with other functional areas and processes across OSD and the Services. Thus, while the Department is fully supportive of the establishment of the USD (R&E) and USD (A&S), the Department is also examining the realignment of legacy AT&L functions to other OSD and Service officials if it is prudent and can provide greater integration of efforts. In so doing, these actions, in tum, can facilitate greater focus of these two USDs on the imperatives for technology innovation and continuing acquisition reform; both of which directly support the needs of our Warfighters, now and in the future.

- With regard to the CMO, the Department is looking carefully at the organizational responsibilities and structures associated with this senior management official position. Our goal is to create a position that will attract the best qualified candidate who possesses the requisite business acumen to optimize the business operations of the Department and to give that person the requisite authority to improve the performance of the business operations of the Department. The focus would address responsibilities for both Department-wide business processes and more focused responsibilities for processes within Office of the Secretary of Defense and defense/field agencies.

Work stated that “[w]hile a final report for Section 901 is required to be submitted to the congressional defense committees no later than August 1, 2017, my plan is to provide the final report either in late spring or early summer to ensure that it can be provided to the

congressional defense committees in time to inform your markup of the NDAA for FY 2018.”

### **FY 2017 DOD Appropriations Conference Report Released; House May Consider Next Week**

#### *Key Points:*

- *The DOD Appropriations package would conform to the spending caps but faces an uncertain fate in the Senate*

On March 2, the House and Senate Appropriations Committees released the [bill text](#) and [joint explanatory statement](#) for the conference report for the FY 2017 Department of Defense Appropriations Act. The House could take up the package next week and possibly send the bill to an uncertain fate in the Senate. Senate Democrats would likely not be inclined to enact a full appropriations bill funding the DOD which could allow for the rest of the government to be funded by a continuing resolution. Additionally, the Administration has articulated plans to submit a FY 2017 supplemental appropriations bill to fund some of the Pentagon’s needs and operations in the Middle East. However, it is expected that this package will also fund construction, in part, of a border wall with Mexico, a proposal many Democrats would oppose. The current continuing resolution, the “Further Continuing and Security Assistance Appropriations Act” (P.L. 114-254), is set to expire on April 28 giving Congress and the Administration almost two full months to address FY 2017 appropriations.

In its [press release](#), the House Appropriations Committee explained, “[t]he bill closely reflects the Defense Appropriations bill the House passed last summer, and is consistent with the final National Defense Authorization Act for

FY 2017.” The Committee claimed that “[i]n total, the bill provides \$577.9 billion, an increase of \$5.2 billion over the FY 2016 enacted level and \$1.6 billion more than the Obama Administration’s request...[which] includes \$516.1 billion in base discretionary funding – an increase of \$2 billion above current levels – and \$61.8 billion in Overseas Contingency Operations (OCO)/Global War on Terrorism (GWOT) funding – \$3.2 billion above current levels.” The Committee stated that “[w]hen combined with the \$5.8 billion in supplemental funding enacted in the Continuing Resolution that passed in December, the total Defense funding for FY 2017 is \$583.7 billion, an increase of \$10.9 billion over FY 2016.”

The Committee noted the following “Bill Highlights:”

- **Military Personnel and Pay** – The agreement includes \$132.1 billion – \$128.7 billion for base requirements and \$3.4 billion for OCO/GWOT requirements – to provide for 1,305,900 active-duty troops and 813,200 Guard and Reserve troops. The agreement includes \$1.6 billion above the request for increased end strength, to include military personnel and operational support costs. The agreement denies the troop reductions proposed in the previous Administration’s fiscal year 2017 budget request. The agreement also fully funds the authorized 2.1 percent pay raise for the military, instead of 1.6 percent as requested by the previous Administration.
- **Operation and Maintenance** – Included in the legislation is \$215.3 billion – \$167.6 billion for base requirements and \$47.7 billion for OCO/GWOT requirements – for operation and maintenance. In total this is \$1.7 billion above fiscal year 2016. This funding supports key readiness programs to prepare our troops for combat and peacetime missions, including flight time and training, equipment and facility maintenance, and base operations. Within this amount, the agreement includes an additional \$1.9 billion above the request to fill readiness shortfalls, invest in facility sustainment, restoration, and modernization programs, provide for additional depot maintenance, and support increased end strength. This funding will help rebuild our forces to ensure our troops have the training and equipment they need to sustain our military superiority.
- **Research and Development** – The agreement contains \$72.7 billion – \$72.3 billion for base requirements and \$407 million for OCO/GWOT requirements – for research, development, testing, and evaluation of new defense technologies. Funding for base requirements is \$2.5 billion above the fiscal year 2016 level, and will help to advance the safety and success of current and future military operations and prepare our nation to meet a broad range of future security threats. Specifically, this funding will support research and development of: the F-35 Joint Strike Fighter; the GPS III operational control and space segments; the new Air Force bomber program; a next-generation JSTARS aircraft; the RQ-4 Triton Unmanned Aerial Vehicle; the Ohio-class submarine replacement; and other important research and development activities.
- **Equipment Procurement** – The legislation provides a total of \$117.8 billion – \$108.4 billion for base

requirements and \$9.4 billion for OCO/GWOT requirements – for equipment and upgrades. Funding for base and GWOT requirements is \$6.8 billion above the previous Administration’s request and \$2.4 billion below fiscal year 2016. These funds support our nation’s military readiness by providing the necessary platforms, weapons, and other equipment our military needs to train, maintain the force, and conduct successful operations. For example, the agreement includes: \$21.2 billion to procure 13 Navy ships, including three DDG-51 guided missile destroyers, three Littoral Combat Ships, one LPD-17, and advance procurement for the polar icebreaker recapitalization project; \$8.2 billion for 74 F-35 aircraft; \$1.1 billion for 14 F/A-18E/F Super Hornet aircraft; \$1.1 billion for 61 UH-60 Blackhawk helicopters; \$774 million for 52 remanufactured AH-64 Apache helicopters, \$190 million for 5 new Apaches, and \$72 million to support advanced procurement needs for an additional 10 aircraft; \$187 million for 28 Lakota light utility helicopters; an additional \$114 million to equip two more brigades with WIN-T; \$1.8 billion for 11 P-8A Poseidon aircraft; \$2.6 billion for 15 KC-46 tanker aircraft; \$1.3 billion for 17 C/HC/KC/MC-130J aircraft; and \$210 million for HMMWV modernization for the active Army, Army National Guard and Army Reserve. The agreement also includes \$750 million for the National Guard and Reserve Equipment account.

- **Defense Health and Military Family Programs** – The agreement contains \$34.1 billion for base and GWOT requirements – \$1.5 billion above the

fiscal year 2016 enacted level and \$314 million above the previous Administration’s request – for the Defense Health Program to provide care for our troops, military families, and retirees. The agreement provides \$312 million for cancer research, \$125 million for traumatic brain injury and psychological health research, and \$296 million for sexual assault prevention and response. All of these funding levels represent increases above the budget request for these programs.

- **Force Structure** – The agreement rejects the Obama Administration’s proposed troop reductions. Instead, the agreement provides increases above fiscal year 2016, including funds for an additional 1,000 active-duty Army soldiers, 1,000 Army National Guard soldiers, 1,000 Army Reserve soldiers, and 1,000 active-duty Marines. Additionally, to maintain four Apache battalions in the Army National Guard, the agreement fully funds the modernization of existing Apaches, provides \$190 million for five new Apaches and supports the annual operating costs of the four battalions. The agreement also provides funds to maintain a Combat Aviation Brigade in Korea.
- **Savings and Reductions to President Obama’s Request** – The agreement reflects commonsense decisions to save taxpayer dollars where possible in areas that will not affect the safety or success of our troops and missions. Some of these savings include: \$1.155 billion from lower-than-expected fuel costs; \$157 million due to favorable economic conditions; and \$4.76 billion in savings from rescissions of unused prior-year funding.

## House Hearing on Cyber Warfare

### Key Points:

- *The House Armed Services Committee held a wide-ranging hearing on cybersecurity with a focus on how to defend U.S. networks and deter and respond to cyber-attacks*

On March 2, the House Armed Services Committee held a [hearing](#) entitled “Cyber Warfare in the 21st Century: Threats, Challenges and Opportunities.” Topics discussed in the hearing included, but were not limited to: (1) Estonian Model; (2) Disentangling USCYBERCOM from the NSA; (3) “Back Door” Access to Consumer Devices; (4) OPM Breach; (5) Cybersecurity Metrics; (6) Cybersecurity Policy Recommendations; (7) Malicious Foreign Actors; (8) Supply Chain Security; (9) Artificial Intelligence, Cybersecurity Personnel & Civilian Support; (10) Battle Damage Assessment; (11) Strengthening Military Capability & Infrastructural Security; (12) Secure Information Sharing; and (13) Cost

Chairman Mac Thornberry (R-TX) stated that country must come to understand the scope of its cybersecurity vulnerabilities. He said cyber warfare is being used by both nation states and non-state actors “in ways that challenge our traditional notions of what is war.” He said cyber capabilities are being used to steal, to destroy, and to influence. Thornberry stated that while cyber can constitute a form of warfare, cyber technologies undergird “most all of our defense efforts.” He argued that cyber contributes to the strength of the U.S. military while creating vulnerabilities for our enemies to exploit.

Ranking Member Adam Smith (D-WA) stated that cyber issues facing the country are

extensive and complex. He noted that no comprehensive strategy yet exists for securing U.S. military cyber capabilities, and that the U.S. lacks an effective policy as how best to respond to cyber-attacks. He noted it is unclear what ways cyber can best be used as an offensive tool against America’s enemies.

New America Foundation Strategist and Senior Fellow Dr. Peter Singer said the United States was recently the victim of “what was arguably the most important cyberattack campaign in history.” He noted that hackers working on behalf of the Russian government have attacked a wide variety of domestic institutions, including the Democrat National Committee (DNC) and Republican National Committee (RNC), along with prominent political leaders and civil society groups like universities and academic research programs. He stated that these hackers have also targeted a number of American allies and have attempted to influence foreign elections. He said such behavior does not yet constitute a “cyber war of the kind that’s often envisioned, with power grids going down and fiery cyber Pearl Harbors.” Instead, Singer argued that the current state of cyber conflict is akin to the Cold War’s pre-digital battles that crossed influence operations with espionage and subversion. He noted that the present cyber conflict zone is multipolar, including significant illicit domestic cybercrime and cyber interference from foreign powers like China. He said he had submitted a 30-point strategy for the record to enhance U.S. cyber operations, each point of which he said should be acceptable on a bipartisan basis. Of the strategy he named three core elements: 1) restoring deterrence, by investing in training, artificial intelligence (AI) and strengthening sanctions; 2) taking actions to raise cyber-resilience; and 3) facing challenges of social media and online influence operations.

RAND Adjunct Management Scientist Dr. Martin C. Libicki argued that a good national cyber deterrence capability has at least four prerequisites: 1) the ability to attribute cyberattacks; 2) a clear communication of cyber thresholds past which reprisals will be sought; 3) credibility that reprisals will be sought when said cyber thresholds are violated; 4) the technological ability to carry out reprisals. He stated that of the four prerequisites, America's technological ability is least in doubt among foreign powers. Libicki said the other three prerequisites require attention. He argued that America's ability to attribute cyber-attacks has improved considerably over the past ten years, but that the government's willingness to prove its attributions to the international community remains lacking. He said that U.S. credibility remains an issue, noting that the country's most recent responses to cyber-attacks have been limited to sanctions of the sort that would not seriously dissuade the determined efforts of a foreign power. Lastly, he said retaliatory thresholds should be clarified, arguing that the smallest cyberattacks often do not do enough damage to warrant a response and that the government may have to limit reprisals to "obviously actionable attacks."

Atlantic Council Nonresident Senior Fellow Jason "Jay" Healey said attribution is not nearly the challenge it used to be, as the U.S. government has made tremendous gains determining which nations are behind cyberattacks. He argued that, contrary to conventional conflict, the center of U.S. cyber power is in Silicon Valley and the private sector, not the military. He stated that testimony before the House in 1991 predicted the inevitability of a major cyber-attack against national infrastructure, but that cyber-deterrence has thus far avoided any such "electronic Pearl Harbor." Healey speculated

cyber may be a singularly escalatory form of international conflict, and therefore argued that the United States should be cautious in utilizing new forms of cyber tactics against other countries. He recommended that a new set of cyber influence teams be folded into the Cyber Mission Force at Fort Meade, and that the leadership of the National Security Agency (NSA) and United States Cyber Command (USCYBERCOM) be split. He stated that the best use of government resources toward cyber defense would be to support those private firms and researchers already innovating cyber solutions. He argued that, while the Pentagon has a number of effective existing cyber protocols, the Department of Defense (DOD) seems not to have a firm grasp on how cyberwarfare will develop in the coming decades.

### **Senate Hearing On Cyber Strategy and Policy**

#### *Key Points:*

- *The Senate Armed Services Committee heard from experts on how to shore up U.S. cyber defenses and responses*

Chairman John McCain (R-AZ) said threats to the U.S. in cyber space continue to grow in scope and severity while the U.S. remains "woefully unprepared." He said cyber will be a defining feature of 21<sup>st</sup> century warfare and the lack of a clear policy and strategy to defend against these types of attacks is unacceptable. He argued treating every attack on a case by case basis has bred indecision and inaction. He added this lack of policy and strategy has also "emboldened our enemies." He stated "he has yet to find a serious person who believes the U.S. has a strategic advantage in cyber space." He said the Committee is well aware that bold action is required in the cyber domain and will continue to apply pressure to the new

administration to develop a strategy that addresses gaps in the policy, legal, and strategic frameworks. McCain said the U.S. must impose costs on those who seek to attack the U.S. which means complex legal questions need to be addressed. He stressed the importance of clarifying roles and responsibilities throughout the government and to adopt flexible thinking. He observed the reward for attacking the U.S. in cyber space outweighs the risk and until the U.S. government demonstrates otherwise, this situation will continue to deteriorate.

Ranking Member Jack Reed (D-RI) said cyber security is characterized by a complex and diverse set of issues. He expressed enthusiasm to hear from witnesses on the President's Commission on Enhancing National Cybersecurity and the recommendations from the Defense Science Board as a result of their recently concluded task force on cyber deterrence. He stressed the importance of defining a coherent cyber strategy and policy. He added international law is an important aspect of the cyber space discussion because it develops slowly. He stated there must be a sense of urgency in improving deterrence capabilities. Reed said the Defense Science Board has made a noteworthy recommendation to increase U.S. capabilities to conduct information operations. He explained the current cyber missions forces were built for defending and penetrating networks and not necessarily for conducting missions targeting or manipulating content.

IronNet Cybersecurity CEO and President and former National Security Agency Director General Keith B. Alexander, USA (Ret.), CEO and President, IronNet Cybersecurity agreed with McCain that the U.S. is woefully unprepared to handle major cyber-attacks on the government or commercial sector. He said this is a result of the lack of a policy, strategy,

and understanding in terms of roles and responsibilities. He noted rules of engagement are also not clearly defined. He asserted the necessary cyber architecture to defend the U.S. does not exist. He said the Presidential Commission on Enhancing National Cybersecurity, which was commissioned in February 2016, includes recommendations on wide-ranging cyber issues. He said these issues are more important than ever given that technology is doubling every two years. He said industry and government should work more closely together. He said the Committee should push for the Department of Defense (DOD) to more clearly lay out the roles and responsibilities of offices related to cyber security issues.

Defense Science Board Chairman Dr. Craig Fields said his aim was to provide the Committee with a brief understanding of the guiding principles that emerged from the Task Force's recent [report](#) on cyber deterrence. He said these principles should not be viewed as policies but rather, like physicists would say, boundary conditions with which any policy should comply. He said the U.S. cyber deterrence posture must include both deterrence by denial and deterrence by cost imposition, with a different balance depending on the perpetrator and the severity of the attack to be deterred. He stated deterrence by cost imposition requires understanding what key adversary decision makers value, holding that which they value at risk, and communicating (explicitly and/or implicitly by precedential action) the credible will and capability to respond. He stressed deterrence by cost imposition requires credible response options at varying levels of conflict. Fields said in the event of a cyber-attack on the U.S., the question should not be whether to impose costs in response, but how and when to do so against the attacker, and how to connect the

response to the attack. He said this guiding principle reinforces the need for high confidence attribution capabilities, as well as an extensive array of resilient military and non-military response options.

## Upcoming Hearings and Events

### March 7

**McMasters Nomination:** The Senate Armed Services Committee will hold a hearing to consider Lieutenant General H.R. McMasters' renomination to his current rank in his new position.

**Russia:** The Senate Appropriations Committee's State, Foreign Operations Subcommittee will hold a [hearing](#) titled "Russian Policies & Intentions Toward Specific European Countries."

### March 8

**Cybersecurity:** The Senate Armed Services Committee's Cybersecurity Subcommittee will hold a closed briefing by the Defense Science Board on cybersecurity.

**Nuclear Weapons:** The Senate Armed Services Committee's Strategic Forces Subcommittee will hold a [hearing](#) titled "Global Nuclear Weapons Environment."

**Nuclear Deterrence:** The House Armed Services Committee will hold a [hearing](#) titled "Military Assessment of Nuclear Deterrence Requirements."

**Army Readiness:** The House Armed Services Committee's Readiness Subcommittee will hold a [hearing](#) titled "The Current State of U.S. Army Readiness."

**Navy Fleet:** The House Armed Services Committee's Seapower and Projection Forces

Subcommittee will hold a [hearing](#) titled "An Independent Fleet Assessment of the U.S. Navy."

### March 9

**CENTCOM and AFRICOM:** The Senate Armed Services Committee will hold a [hearing](#) titled "United States Central Command and United States Africa Command."

**Nuclear Deterrence:** The House Armed Services Committee's Strategic Forces Subcommittee will hold a [hearing](#) titled "Nuclear Deterrence - The Defense Science Board's Perspective."

**Russian Disinformation:** The House Foreign Affairs Committee will hold a [hearing](#) titled "Undermining Democratic Institutions and Splintering NATO: Russian Disinformation Aims."

### March 10

**Marine Corps Modernization and Readiness:** The House Armed Services Committee's Tactical Air and Land Forces Subcommittee will hold a [hearing](#) titled "The Effect of Sequestration and Continuing Resolutions on Marine Corps Modernization and Readiness."

*For more information on defense issues you may [email](#) or call Michael Kans at 202-659-8201. Alex Rankin and Alex Hopkins contributed to this section.*

## HEALTH

### Committees Plan to Hold ACA Markup Next Week

#### *Key Points:*

- *Several House Republicans have said the Energy and Commerce Committee and Ways*

*and Means Committee will hold markups to repeal and replace the Affordable Care Act.*

- *No meetings have been officially scheduled or text released*

According to Committee members, both the House Energy and Commerce Committee and the House Ways and Means Committee will be holding markups of Affordable Care Act repeal and replace legislation next week. At this time no meetings have been officially scheduled.

Representative Chris Collins (R-NY), a member of the House Energy and Commerce Committee, said “that’s our plan” when asked if the bill will be marked up next week. Collins also predicted the Congressional Budget Office score will not be ready, saying “it looks like unfortunately, based on the delays, we may be marking this up and voting on it before we have a score.”

Democrats on the Energy and Commerce Committee sent a [letter](#) to Chairman Greg Walden (R-OR) demanding the text of the bill be posted 30 days before a markup is held. The Democrats cited remarks made by Speaker Paul Ryan (R-WI) pledging to move the bill through the regular legislative process with public hearings. Senator Rand Paul (R-KY) has complained the bill is being kept in a “secret location” asserting it should be an “open and transparent process.”

Democrats from the Energy and Commerce Committee and Paul were in search of draft on March 2 prompting a response from Walden. He stated “reports that the Energy and Commerce Committee is doing anything other than the regular process of keeping its members up to speed on latest developments in its jurisdictions are false.” He emphasized Members and staff are continuing to discuss and refine draft language.

Senator John Cornyn (R-TX) has said the Senate will take up the House bill rather than draft its own alternative. He explained “the goal is for the House to pass a bill that we can then take up and pass here in the Senate.”

President Donald Trump reaffirmed his support for repeal during his [speech](#) to Congress on February 28. He emphasized the use of tax credits as well as expanded access to health savings accounts. He also promoted greater flexibility for states in their Medicaid programs.

## **Senate Finance Confirms CMS Administrator**

### **Key Points:**

- *The Senate Finance Committee favorably reported the nomination of Seema Verma to be Administrator of the Centers for Medicare and Medicaid Services, 13-12.*

On March 2, the Senate Finance Committee voted on the nomination of Seema Verma to be administrator of the Centers for Medicare and Medicaid Services (CMS). The Committee favorably reported the nomination by roll call vote 13-12. Her nomination will now go to the full Senate.

Chairman Orrin Hatch (R-UT) praised the nominee’s work with state governments to modernize their Medicaid systems. He contended if needed changes are to be made, it will be important to have good partners at CMS.

Ranking Member Ron Wyden (D-OR) expressed concern that Verma failed to adequately answer many of the Committee’s questions, both at the hearing and in written responses. He noted Verma also lacks

experience in Medicare and failed to offer any opinions on possible reforms.

## Upcoming Hearings and Events

### March 7

**Insurance:** The University of Pennsylvania Leonard Davis Institute of Health Economics and Penn Wharton Public Policy Initiative will hold a forum on “Health Reform and the Future of the Individual Insurance Market: Weighing the Evidence.”

**Health Care Reform:** Health Affairs will hold a forum on “Delivery System Innovation.”

### March 8

**Precision Medicine:** The National Academy of Sciences will hold a workshop on “Enabling Precision Medicine: The Role of Genetics in Clinical Drug Development.”

**Appropriations:** The House Appropriations Committee’s Labor, Health and Human Services, Education and Related Agencies Subcommittee will hold a “Public Witness Day” hearing.

**Medical Research:** The Senate Appropriations Committee will hold a hearing on saving lives through medical research.

### March 9

**Appropriations:** The House Appropriations Committee will hold a hearing on “Management Challenges at the Departments of Labor, Health and Human Services, and Education and the Social Security Administration (SSA): Views from the Inspectors General.”

*For more information about healthcare issues you may [email](#) or call Nicole Ruzinski or George Olsen at 202-659-8201.*

## TRANSPORTATION AND INFRASTRUCTURE

### Trump On Infrastructure Plan

#### *Key Points:*

- *In pledging to push for a \$1 trillion infrastructure package using private and public funding sources, the President provided little more by way of detail*
- *Democrats articulated their support for a package financed through public funding sources*

In his first address to Congress on February 28, President Donald Trump reiterated his commitment to a large infrastructure package but is stressing that the package will be comprised of both private and public funding. Trump said that “[a]nother Republican President, Dwight D. Eisenhower, initiated the last truly great national infrastructure program — the building of the interstate highway system.” He said that “[t]he time has come for a new program of national rebuilding.” Trump stated that “America has spent approximately six trillion dollars in the Middle East, all this while our infrastructure at home is crumbling.” He said that “[w]ith this six trillion dollars we could have rebuilt our country — twice...[a]nd maybe even three times if we had people who had the ability to negotiate.” Trump stated that “[t]o launch our national rebuilding, I will be asking the Congress to approve legislation that produces a \$1 trillion investment in the infrastructure of the United States -- financed through both public and private capital -- creating millions of new jobs.” He said that “[t]his effort will be guided by two core principles: Buy American, and Hire American.”

The White House issued a [fact sheet](#) in conjunction with Trump’s speech that provided a bit more detail:

- Tonight, President Trump is asking Congress to approve a \$1 trillion investment in the infrastructure of the United States.
- President Trump signed a Presidential Memorandum to clear roadblocks to construction of the Keystone XL Pipeline.
- President Trump signed a Presidential Memorandum declaring that the Dakota Access Pipeline serves the national interest and initiating the process to complete construction.
- President Trump signed a Presidential Memorandum to ensure that whenever possible all new American pipeline infrastructure projects use materials and equipment made in the United States.
- President Trump signed an Executive Order expediting the environmental review and approval processes for domestic infrastructure projects.

Democrats responded to Trump’s proposals cautiously, stressing the need for public financing. On March 1, Senate Minority Leader Chuck Schumer (D-NY) said of Trump’s speech “he talked in his speech about infrastructure.” He stated that “[w]e Democrats put together a plan a month ago...[but] [w]e haven’t heard a peep out of him, no plan, no ideas.” House Minority Leader Nancy Pelosi (D-CA) said that Democrats would consider working with the Administration “if he has an infrastructure plan that really is a good plan or that we can work together on” but stated that she and other Democrats could not support “a tax bill disguised as infrastructure.”

House Transportation and Infrastructure Committee Ranking Member Peter DeFazio

(D-OR) said “President Trump has repeatedly said that he wants to invest in infrastructure and that he supports Buy America.” He said that Trump “briefly reiterated those talking points again tonight...[b]ut again, the President failed to provide any real information about what his plan looks like, and more importantly how he pays for it.” He stated that “[i]t’s easy to say you are for infrastructure investments—it’s a lot harder to offer real ways to pay for these critical investments.” DeFazio noted that “[e]arlier this month, I sent President Trump [three legislative ideas](#) that would invest in our crumbling infrastructure...[that] are fully paid for, and would not increase the deficit by one penny.”

### Senate Commerce Hearing On Infrastructure

#### *Key Points:*

- *Stakeholders from rural states discussed the challenges of funding and building projects*
- *The Chairman stressed that rural states will not be able to attract private funding*

On March 1, the Senate Commerce, Science and Transportation Committee held a [hearing](#) entitled “Connecting America: Improving Access to Infrastructure for Communities Across the Country.”

Topics discussed in the hearing included, but were not limited to: (1) Broadband Access; (2) Infrastructure Funding; (3) Automated Vehicles; (4) General Federal Regulatory Hurdles; (5) Endangered Species Act & EPA; (6) Permitting Reform; (7) U.S.-Mexico Border Wall; (8) Accountability in Future Infrastructure Bill; (9) Global Warming and Sea-level Rise; (10) Rail Safety; (11) Prospect of an Independent Infrastructure Commission; (12) Rural Development & P3

Chairman John Thune (R-SD) [stated](#) that President Donald Trump has called for a renewal of American infrastructure. He said that, though separated by thousands of miles, America's various cities and rural communities must be connected by safe and effective surface transportation networks. He noted that Congress recently reauthorized the "Fixing America's Surface Transportation (FAST) Act" (P.L. 114-94), which he described as a "big step in the right direction." Thune said a robust and efficient transportation sector is necessary to connect rural states like South Dakota to national and international markets. Thune stated that while the U.S. is an international leader in broadband innovation and investment, many rural communities continue to lack internet connectivity. He said the efficacy of existing government broadband programs must be reevaluated prior to the passage of a new infrastructure bill. He stated that the "Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless (MOBILE NOW) Act" of the 114th Congress will do much to achieve greater connectivity. Thune noted that states and localities are allocated shares of federal FAST Act funding through formulae that most lawmakers consider equitable. He stated that high density urban areas may be better suited than rural areas to receive a broad variety of surface transportation investment, including public-private partnerships (P3s). He said transportation firms have been faced with burdensome regulation.

Ranking Member Bill Nelson (D-FL) [stated](#) that each of the witnesses can provide insight into the infrastructure needs of their particular states. He said that many Senators accepted Trump's call to produce a \$1 trillion infrastructure bill, noting that an infrastructure bill was introduced one month ago. He stated

that strain on existing surface transportation infrastructure is overwhelming U.S. roads and bridges. Nelson noted that vast areas of his state are rural and lack adequate broadband connectivity. He stated that infrastructure issues cannot be resolved by simple, uniform solutions such as toll roads. He argued that a portion of any infrastructure spending will need to be put toward the aging "9-1-1 infrastructure." He said that, while the country is in dire need of a federal infrastructure program, funding for the program remains a sensitive issue.

South Dakota Governor Dennis Daugaard said federal transportation investment in South Dakota benefits the nation as a whole, arguing rural states serve as the "bridge" between major commercial centers elsewhere in the country. He stated that increased federal infrastructure funds provided to South Dakota would create jobs and be put to immediate use. He said any new infrastructure bill will likely encourage P3 solutions while cautioning that P3 projects requiring significant returns will not be a workable solution for rural states. Daugaard argued that any infrastructure bill should utilize the FAST Act formulae so funds are distributed in a balanced way to communities across the country. He added that strengthening the Highway Trust Fund is an important objective, but stated that the fund will not support even FAST Act program levels after 2020 without new legislation. Daugaard argued that states do not receive the benefits of the FAST Act due to part-year continuing resolution, and that promptly passing legislation to fully fund the FAST Act would enhance infrastructure investment and transportation safety. He stated that the draft Multimodal Freight Network published by U.S. Department of Transportation (DOT) last year leaves rural states underserved. He encouraged

Congress to simplify and expedite program delivery.

Utah Department of Transportation Executive Director Carlos Braceras noted 65% of Utah lands are owned by the federal government while 90% of Utahns live in urban areas, making the state at once highly urban and rural. He said the fundamental purpose of transportation is to grow the economy, arguing that the safe and reliable movement of freight is crucial to connect rural areas to economic opportunities. He stated that businesses in Utah rely on the national transportation system to move goods across state lines and enable tourist access to the state. He claimed that the federal government has a “successful track record in partnering with the states” on surface transportation investment. Braceras asked that Congress use the formula-based program structure currently in place through the FAST Act as part of any future infrastructure bill and to focus on direct funding to states rather than financing mechanisms. He stated that the FAST Act and the “Moving Ahead for Progress in the 21st Century (MAP-21) Act” (P.L. 112-141) have been successful but can be improved upon. Braceras said asked that the National Environmental Protection Act (NEPA) assignment, application and audit process be simplified to allow states to assume all the activities of DOT with respect to environmental review, consultation and approval. He recommended that Congress consider authorizing a consolidated funding pilot program that treats all core funding provided to state Departments of Transportation under the National Highway Performance Program, Surface Transportation Program, and Highway Safety Improvement Program as a single, consolidated apportionment.

### House Hearing on Airports

#### Key Points:

- *As part of its FAA reauthorization process, the House committee of jurisdiction examined possible reforms of funding mechanisms and programs to help airports*

On March 1, the House Transportation and Infrastructure Committee’s Aviation Subcommittee held a [hearing](#) entitled “Building a 21st Century Infrastructure for America: State of American Airports.” Topics discussed in the hearing included: (1) infrastructure funding; (2) passenger facility charge (3) security; (4) small and regional airports; (5) minority involvement; (6) general aviation; and (7) unmanned aircraft systems.

Chairman Frank A. LoBiondo (R-NJ) said that airports are the most visible piece of the air transportation system and stated that the U.S. is home to three of the ten busiest airports in the world. He asserted that small general aviation is included in transportation and argued that airports foster small business development. LoBiondo declared that the U.S. must support and encourage the development of airports. He said that Airport Improvement Program (AIP), passenger facility charges (PFCs), and bonds all fund airport infrastructure but noted that the U.S. is falling behind global competitors. He stated that available flights to rural communities are declining and said that Congress must plan for future passenger growth. He asserted that Congress must also remember the needs of smaller communities.

Ranking Member Rick Larsen (D-WA) said that the hearing will allow Congress to understand what is needed in the Federal Aviation Administration (FAA) reauthorization. He said aviation facilities must be modernized and stated that more than 800 million people board aircrafts each year. Larsen

argued that the U.S has over 19,000 airports and said that without adequate funding and infrastructure the aviation economy will fall behind. He noted that he has called for an immediate FAA modernization that will include NextGen technology and added capacity. Larsen explained that the FAA estimates that airports will need at least \$100 billion in infrastructure funding. He said that Congress must encourage investment and stressed that Congress must keep in mind a long-term reauthorization of the FAA.

Full Committee Chairman Bill Shuster (R-PA) said that FAA needs to be transformational and stated that small airports are important to the aviation system and should not be forgotten. He argued that aviation is vital to the country and said that the FAA, including the air traffic control system, is in need of significant reform. Shuster noted that President Donald Trump has mentioned several infrastructure priorities and said that he has spoken with him about the need to transform aviation.

Full Committee Ranking Member Peter DeFazio (D-OR) said he is particularly interested in updating airports and said that many airports need a way to finance bonds. He noted that he introduced a bill to remove the cap on PFCs. He argued that raising the PFC will not decrease airline travel and said that airline fees do not discourage people from flying. DeFazio stated that the individuals who fly, benefit from the infrastructure improvements provided by the fee. He noted Trump's comments about failing airports and stated that the user fee system for airport infrastructure funding is efficient. He stated that there is a need for finance and funding reform. DeFazio asserted that that ground capacity, including gates and runways, need to be expanded. He said that Congress needs to help aviation grow into the 21st century.

Dallas/Fort Worth International Airport Chief Executive Officer Sean Donohue said that there are 2,000 employees that work for DFW airport and noted that the hearing is the right step forward for airports, airlines, and passengers. He stated that each airport has its own unique characteristics, challenges and benefits. Donohue said that many airports are in need of new runways and terminals and argued that there is not a one size fits all approach to infrastructure development. He stated that DFW is ranked 3rd in world airport operations and stated that it contributes \$37 billion to the Texas economy. Donohue explained that large hub airports, like DFW account for 73 percent of total customer traffic and argued that infrastructure improvements are not simple construction projects. He explained that they are multi-year ventures. He asserted that airport financing remains a significant issue and argued that airports must operate like a business. He explained that airports must fund projects off of revenue. Donohue said that airline fees, AIP grants, PFCs, and municipal bonds assist in infrastructure funding. He stated that \$100 billion will be needed to improve airport infrastructure. He noted that the fundamental priorities are safety, security, and sufficient investment.

Port of Seattle's Aviation Division Managing Director Lance Lyttle said that more aviation facilities at the Seattle-Tacoma International Airport (Sea-Tac) are needed to keep pace with record growth and argued that the growth represents the global relevancy of the Washington area. Lyttle explained that Sea-Tac is in the middle of updating its 20 year forecast and said that he is estimating a need for a \$10 billion investment. He argued that the AIP does not meet all the investment needs of the Airport and said the cap on PFCs needs to be

removed. Lyttle said that he fees only impact the passengers that use the facilities and argued that it is an effect method of funding. He stated that the current PFC caps are not efficient and asserted that they should be removed in order to help Sea-Tac pay for its 20 year forecast. Lyttle argued that infrastructure should be funded by both PFCs and government grants. He stated that security is the greatest challenge at U.S. airports and stressed that Congress should be a partner in investment, security, and growth. He thanked DeFazio for introducing legislation to remove the PFC cap.

## Upcoming Hearings and Events

### March 8

**Infrastructure:** The Senate Appropriations Committee’s Transportation and Housing and Urban Development Subcommittee will hold a [hearing](#) titled “Investing in America: Funding our Nation’s Transportation Infrastructure Needs.”

**Air Transportation:** The House Transportation & Infrastructure Committee’s Aviation Subcommittee will hold a [hearing](#) titled “Building a 21st Century Infrastructure for America: Air Transportation in the United States in the 21st Century.”

### March 9

**Water Infrastructure:** The House Transportation & Infrastructure Committee’s Water Resources and Environment Subcommittee will hold a [hearing](#) titled “Building a 21st Century Infrastructure for America: The Role of Federal Agencies in Water Infrastructure.”

*For more information on transportation issues you may [email](#) or call Michael Kans at 202-659-8201. Alex Rankin and Michaela Boudreaux contributed to this section.*

## TECHNOLOGY

### **Committee Marks Up Bill To Task NIST With Fostering Greater Use of Framework and Other Standards**

#### *Key Points:*

- *The House Science Committee marked up and reported out a bill that would expand NIST’s current role in federal cybersecurity along a mostly party line vote*

On March 1, the House Committee on Science, Space, and Technology held a [markup](#) and favorably reported the “NIST Cybersecurity Framework, Assessment, and Auditing Act of 2017” ([H.R. 1224](#)), as amended, by a recorded vote of 19 to 14. The recorded vote was split along party lines, except for Representative Daniel Lipinski (D-IL), who voted to favorably report the bill. The Committee adopted three amendments, including a manager’s amendment.

Chairman Lamar Smith (R-TX) said past hearings held by the Committee underscored the need for a robust approach to assessing cybersecurity throughout federal agencies. He contended H.R. 1224 “is vital to ensuring our citizens’ information is secure.” He stated the aftermath of several recent data breaches, including those at the Office of Personnel Management (OPM), the Internal Revenue Service (IRS), and the Federal Deposit Insurance Corporation (FDIC), demonstrated that the federal government is a target for cyber-attacks. He argued because the government collects personally identifiable information on all Americans, it is important that its cybersecurity framework is as secure as possible. He described the legislation as “commonsense” and said it capitalizes on the National Institute of Standards and

Technology’s (NIST) “unique position as a global leader in cybersecurity knowledge and readiness.” Smith said NIST has the requisite experts to develop standards and guidelines for federal agencies to bolster their cybersecurity capabilities. He said the bill would give NIST the ability to go beyond developing guidelines to include evaluations and audits of federal agency cybersecurity compliance. He stressed that the bill does not grant NIST with enforcement powers. He added NIST’s new abilities to assess and audit will only apply to federal agencies and not the private sector. He noted a NIST reauthorization in the near future will address the resources needed for NIST to carry out an expanded mission. He said a vote against this bill is a vote for maintaining the status quo. He urged the Committee to favorably report the bill.

Ranking Member Eddie Bernice Johnson (D-TX) said she “understands and sympathizes with the Chairman’s desire to move cybersecurity legislation.” She said she cannot support the legislation because it does not take into account recommendations from the Government Accountability Office (GAO) and because it represents a large unfunded mandate for NIST. She said expert witnesses have argued the Department of Homeland Security (DHS), and not NIST should carry out surveys and assessments of the adoption and effectiveness of the Cybersecurity Framework. She stated “NIST itself has steadfastly maintained that they are the wrong agency to do it, and not just because of limited resources.” She said she does not believe the White House Office of Science and Technology Policy (OSTP) should be given any role in evaluation or oversight of cybersecurity in the private sector or the Federal government. She remarked “perhaps if we substituted the Office of Management and Budget (OMB) or DHS for OSTP everywhere

in this bill, it might make more sense.” Johnson argued the “strangest” part of the bill is the provision that instructs NIST to conduct annual cybersecurity audits of other agencies. She argued NIST is not an auditing agency and current law already assigns this responsibility to agency inspectors general. She stressed she is ready to collaborate and cooperate on cybersecurity legislation and oversight but H.R. 1224 has a number of controversial new elements which were “clearly not vetted with the cybersecurity community or the Administration.” She said she will not support the passage of the legislation.

### Coats Nomination Hearing

#### *Key Points:*

- *The Senate Intelligence Committee questioned Trump’s nominee to oversee the Intelligence Community (IC) on a range of issues including Russian hacking and NSA surveillance*

On February 28, the Senate Select Committee on Intelligence held a [hearing](#) entitled “Open Hearing: Nomination of Senator Dan Coats to be Director of National Intelligence.” Topics discussed in the hearing included, but were not limited to: (1) NSC & Executive Order: National Security Presidential Memorandum Number 2; (2) Section 702 of the Foreign Intelligence Surveillance Act; (3) Temperament; (4) Bureaucracy & Growth of ODNI; (5) Congressional Oversight; (6) Enhanced Interrogation; (7) Russia; (8) Leadership of the Intelligence Community; (9) Foreign Agent Registration Act of 1938; (10) Intelligence Technology & Cyber Concerns; (11) Narcoterrorism; (12) Robb-Silberman Commission

Chairman Richard Burr (R-NC) said former Senator Dan Coats has more than three decades of service in the U.S. House, Senate,

and as Ambassador to Germany. He said Coats has been asked to serve as Director of National Intelligence (DNI) at a time of unprecedented danger to the United States. He expressed complete confidence in Coats' ability to lead the intelligence community while maintaining an unwavering respect for the rule of law. He stated that he looks forward to working with his colleagues to reauthorize the Foreign Intelligence Surveillance Act (FISA) as soon as possible. He assured Coats that the Committee would continue to offer consistent oversight of Office of the Director of National Intelligence (ODNI) should he be confirmed.

Vice Chairman Mark Warner (D-VA) said that Coats is known to the Senate Intelligence Committee. He said that Coats firmly believes in the value of intelligence and is committed to keeping it "absolutely free" of political influence. He said it is necessary to "tell truth to power," and to maintain absolute independence as DNI even in the face of political pressure. He expressed confidence that Coats will faithfully fulfill the duties of DNI. Warner stressed that, if confirmed, Coats would need to pursue investigations into the question of Russian hacking during the 2016 presidential election. He said that he would not accept any political interference into investigations about Russian influence into American affairs. He stated that Coats already assured him he would not support the use of enhanced interrogation if confirmed as DNI.

Former Senator Dan Coats (R-IN) [stated](#) that he served on the Senate Select Intelligence Committee during his time in Congress. He said that, if confirmed, his responsibility as DNI will be to provide President Trump with accurate, objective, and apolitical intelligence by directing the various national intelligence agencies under his authority. Coats stated that the growing risk of cyberattacks by foreign

actors must be addressed, arguing that many new cyber threats are constantly being created as the world becomes increasingly cyber-connected. He stated that radical Islamic terrorism poses an issue for national security. He expressed concern over China's and Russia's growing international assertiveness, and warned about the threat posed by North Korea's nuclear weapons program. He stated that as Ambassador to Germany, he oversaw the activities of over a dozen agencies at the embassy, and that his experience there will be valuable in coordinating the efforts of the Intelligence Community (IC). Coats stated that there has been much discussion "in the vein of efficiency" about the ODNI, and defended the role and scope of ODNI as an integrative and organizing force for the IC. He stated that every government agency must constantly review its operations, and in that spirit he pledged to review the operations of ODNI and every intelligence agency to maximize efficiency and effectiveness.

### House Judiciary 702 Hearing

#### *Key Points:*

- *With a key surveillance authority set to expire at the end of the calendar year, the House Judiciary Committee held its first hearing of the year on the issue*

On March 1, the House Judiciary Committee held a [hearing](#) on Section 702 of the Foreign Intelligence Surveillance Act, which is set to expire at year's end.

Chairman Bob Goodlatte (R-VA) remarked that "[m]uch has happened since the law was last reauthorized, however, including the unauthorized disclosures of classified information by Edward Snowden in 2013 that spawned significant public debate on U.S. government surveillance." He said that "we have very recent jurisprudence upholding the

statute's constitutionality." Goodlatte said that "[l]ike congressional oversight, judicial oversight of this program is an integral safeguard so exploring various court's legal analysis concerning 702 will be beneficial for our own oversight as well." He said that "[t]his hearing is the first step of this Congress toward a detailed, thorough and careful examination." Goodlatte stated that "[s]trong and effective national security tools like Section 702 and civil liberties can and must coexist."

Ranking Member John Conyers (D-MI) stated that "[o]n April 22, 2016, several members of this committee wrote to [former] Director [of National Intelligence James] Clapper to request that he prepare a public estimate of the impact of section 702 on the United States citizens." He said that "[b]y the time we wrote our letter, more than 30 civil liberties organizations had petitioned the director for the same." Conyers stated that "I was encouraged by the government's initial response." Conyers stated that "[t]he Office of the Director of National Intelligence (ODNI) and National Security Agency (NSA) took the extraordinary step of holding an unclassified briefing for our personal staffs...[and] [o]n December 16, our group of members again wrote to Director Clapper to memorialize our understanding of the project." He said that "[u]nfortunately, here we are at the beginning of our debate and the intelligence community has not so much as responded to our December letter, let alone completed the project."

United States Naval Academy Assistant Professor Jeff Kosseff said that the Section 702 program "is subject to rigorous oversight by the three branches of government and, on balance, complies with the Fourth Amendment." He said "[t]hat is not to say that I easily arrived at my conclusion, nor do I deny that there are some aspects of the program that

raise very, very difficult Fourth Amendment questions." Kosseff stated that "[t]he public record strongly supports the conclusion that 702 is an effective national security program...[and] [f]or example, the privacy and civil liberties board noted that more than 25 percent of the NSA's reports about international terrorism rely at least in part on 702 information, 702 is simply a more nimble alternative to Title 1 of FISA which was designed to protect subjects who are U.S. persons."

Saul Ewing LLP Partner April Doss stated that "Section 702 authority strikes an appropriate balance between the government's need for foreign intelligence information and the privacy impacts on individuals...[and] [t]he statutory framework incorporates robust oversight requirements and privacy protections." She said that "[t]hose protections have been implemented across all three branches of government in meaningful and substantive ways and the 702 authority has consistently, since its passage in 2008, provided critical intelligence information to the U.S. and to its allies including intelligence critical to supporting war fighters in the field that would not have been obtainable in other ways." Doss said that "despite some public misconceptions to the contrary, [Section] 702 is a targeted intelligence authority...[and] [i]t's not bulk collection."

The Brennan Center for Justice's Liberty & National Security Program Co-Director Elizabeth Goitein said that "Section 702 of the act has been used to monitor suspected terrorists overseas, to trace their networks, and to disrupt their plots...[and] [a]ll of us in this room, I imagine, support that goal and those activities." She said that "[w]e are here today because of the other things that Section 702 has been interpreted to allow." Goitein stated

that the government is “scanning the content of almost all of the international communications that flow into and out of the United States, and is acquiring hundreds of millions of communications each year.” She said that “[w]e know from how the data is collected that it includes a massive amount of Americans’ communications...[b]ut despite repeated requests by members of this Committee, the government still has not managed to provide an estimate of how many Americans’ communications are swept up.” Goitein said that “[w]e also know that despite being required to minimize the retention and use of Americans’ data, the government keeps that data for years and routinely searches it for information to use against Americans in ordinary criminal proceedings.”

Center for a New American Security Senior Fellow Adam Klein said “[i]n a recent [report](#), two colleagues and I offered more than 60 recommendations for the future of surveillance policy, including Section 702.” He said that “[o]ur research was informed by private consultations with dozens of current and former government officials, technology experts, legal scholars and privacy advocates.” Klein stated that “[m]y written testimony lists more than a dozen concrete actionable ways Congress can do this as part of this process...[and] I’ll just highlight a few here:

- First, and I think this is the most urgent issue facing the committee during the reauthorization process, Congress needs to revive the Privacy and Civil Liberties Oversight Board.
- Another area where there’s room for pragmatic reform is queries of Section 702 information using U.S. person identifiers, especially FBI queries in criminal investigations that are not related to national security. This practice does raise real civil liberties

concerns...[b]ut at the same time, there are reasons not to prohibit these queries altogether, or at least to be very cautious before doing so.

- Now, that said, there are ways to address privacy concerns short of banning these queries altogether. The most important is transparency. So the government should provide more information about the number of such queries; about how often they return Section 702 information; and about how the Justice Department uses that information downstream in the criminal justice system.
- Another possibility worth exploring is whether the FBI could continue running all the queries it runs today, but in some subset of them receiving only the metadata of the responsive communications initially, instead of the underlying content. That could be enough to reveal any connections to problematic foreign actors.
- One final recommendation I’d like to highlight. The USA Freedom Act created a pool of cleared advocates to present public interest arguments before the FISA court. Now, whether to appoint one of those advocates is currently in the court’s discretion. We believe that Congress should make it mandatory in at least one case a year: the court’s annual review of section 702. That’s a very easy way to strengthen judicial oversight of 702, with absolutely no cost for national security.

### **FCC Stays Data Security Portion of Broadband Privacy Rules**

*Key Points:*

- *Ahead of possible CRA action, the FCC stays a key piece of a regulation of broadband providers regarding the privacy of users*
- *The FCC and FTC will work to “harmonize” regulation of ISPs*

On March 1, the Federal Communications Commission (FCC of Commission) voted along party lines to stay the data security portion of the broadband provider privacy rules put in place last October by the FCC that were set to take effect on March 2. However, the other portions of the rules pertaining to “the new notice requirements, customer approval requirements, and data breach notification requirements” will remain in place until the FCC considers other petitions to undo those regulations as well. Moreover, it is possible that Congress could use the Congressional Review Act process to undo the rest of the regulations despite strong opposition from Democrats.

In its [press release](#), the FCC stated that “it has issued a temporary stay of a data security regulation that would have subjected Internet service providers (ISPs) to a different standard than that applied to other companies in the Internet ecosystem by the Federal Trade Commission (FTC).” The FCC claimed that “[t]oday’s decision will maintain a status quo that has been in place for nearly two years with respect to ISPs and nearly a decade with respect to other telecommunications carriers...[and] will remain in place until the Commission is able to act on pending petitions for reconsideration.” The FCC claimed that its stay “will provide time for the FCC to work with the FTC to create a comprehensive and consistent framework for protecting Americans’ online privacy.”

In a [joint statement](#), FCC Chairman Ajit Pai and Acting FTC Chairman Maureen Ohlhausen

stated that the FCC and FTC “are committed to protecting the online privacy of American consumers” and stated their belief that this is best done through “a comprehensive and consistent framework.” They stated “[w]e still believe that jurisdiction over broadband providers’ privacy and data security practices should be returned to the FTC, the nation’s expert agency with respect to these important subjects...[and] [a]ll actors in the online space should be subject to the same rules, enforced by the same agency.” They stated that “[u]ntil that happens, however, we will work together on harmonizing the FCC’s privacy rules for broadband providers with the FTC’s standards for other companies in the digital economy.”

In her dissent, Commissioner Mignon Clyburn stated that “[w]ith a stroke of the proverbial pen, the FCC—the same agency that should be the “cop on the beat” when it comes to ensuring appropriate consumer protections—is leaving broadband customers without assurances that their providers will keep their data secure.” She stated that “[i]f the problem with the data security rule is, for example, the ability of the Commission to look to other Congressional mandates for guidance, then simply issue interpretive guidance that narrows the scope of the rule.” Clyburn stated that “[t]his Order is but a proxy for gutting the Commission’s duly adopted privacy rules—and it does so with very little finesse.”

The FCC explained that the 2016 Privacy Order:

requires BIAS providers and other telecommunications carriers to “take reasonable measures to protect customer [proprietary information] from unauthorized use, disclosure, or access.” It states that “the reasonableness of a provider’s data

security practices will depend significantly on context” and identifies factors that a provider must consider, specifically, the nature and scope of its activities; the sensitivity of the data it collects; its size; and technical feasibility. The Order describes practices that the Commission “presently consider[s] exemplary of a reasonable and evolving standard of data security.” It also identifies that “existing privacy and data security laws, best practices, and public-private initiatives” are each “a potential source of guidance on practices that may be implemented to protect the confidentiality of customer [proprietary information].” Finally, the Order adopts harmonized data security requirements for BIAS providers and telecommunications carriers that were subject to the Commission’s predecessor customer proprietary network information rules.

Senator Jeff Flake (R-AZ) has announced his intention to introduce a resolution under the CRA process to rollback all of the 2016 Privacy Order and may have as many as 12 cosponsors at present. In the same vein, the House Energy and Commerce Committee’s Technology Subcommittee Chairwoman Marsha Blackburn (R-TN) has said she is working towards the same goal.

In a February 28 [letter](#), Senators Ed Markey (D-MA), Richard Blumenthal (D-CT), Elizabeth Warren (D-MA), and Al Franken (D-MN) called on Pai to keep in place the 2016 Privacy Order, especially in light of “the mounting number of data breaches impacting consumers throughout this country” and claimed that doing otherwise “would make subscribers’ sensitive information more

vulnerable to breaches and unauthorized use.”

## NY Cyber Regulations

### Key Points:

- *The state of New York issues regulations that will require regulated financial services companies to certify cybersecurity compliance*
- *These regulations are being framed as the first binding state regulations on cybersecurity*

The New York State Department of Financial Services’ (NYDFS) new cybersecurity regulations took effect on March 1. In its [press release](#), NYDFS stated that “[t]he final regulation requires banks, insurance companies, and other financial services institutions regulated by the Department of Financial Services to establish and maintain a cybersecurity program designed to protect consumers’ private data and ensure the safety and soundness of New York’s financial services industry.”

NYDFS explained that “[t]he final risk-based regulation includes certain regulatory minimum standards while encouraging firms to keep pace with technological advances...[and] [t]he new regulation provides important protections to prevent and avoid cyber breaches, including:

- Controls relating to the governance framework for a robust cybersecurity program including requirements for a program that is adequately funded and staffed, overseen by qualified management, and reported on periodically to the most senior governing body of the organization;
- Risk-based minimum standards for technology systems including access controls, data protection including encryption, and penetration testing;

- Required minimum standards to help address any cyber breaches including an incident response plan, preservation of data to respond to such breaches, and notice to DFS of material events; and
- Accountability by requiring identification and documentation of material deficiencies, remediation plans and annual certifications of regulatory compliance to DFS.

*This Week in Congress was written by Laura Simmons.*

The NYDFS made some changes to the draft regulations released in October, but in the main the final regulations are similar to the draft regulations. However, instead of most of the regulation being effective 180 days after being published in the New York State Register, parts of the regulations will be effective in 2017, 2018, 2019, and 2020.

## Upcoming Hearings and Events

### **March 8**

***FCC Oversight:*** The Senate Commerce, Science, and Transportation Committee will hold a [hearing](#) titled “Oversight of the Federal Communications Commission.”

***Small Business Cybersecurity:*** The House Small Business Committee will hold a [hearing](#) titled “Coordinating Federal Cybersecurity Resources for Small Businesses.”

### **March 9**

***Public-Private Cyber Cooperation:*** The House Homeland Security Committee’s Cybersecurity and Infrastructure Protection Subcommittee will hold a [hearing](#) titled “The Current State of DHS Private Sector Engagement for Cybersecurity.”

*For more information on technology issues you may [email](#) or call Michael Kans at 202-659-8201. Alex Rankin and Alex Hopkins contributed to this section.*